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87-981

Supreme Court, U.S.
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NO.

in the

Supreme Court
of the
United States

October Term, 1987

BEECH AIRCRAFT CORPORATION,

Petitioner,

vs.

JOHN C. RAINEY,

Respondent,

BEECH AIRCRAFT CORPORATION,

Petitioner,

vs.

RONDI M. KNOWLTON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether evaluative conclusions contained in a trustworthy investigative report, prepared pursuant to law are admissible pursuant to Federal Rule of Evidence 803(8)(c)?

II.

Whether the Eleventh Circuit Court of Appeals misconstrued Fed. R. Evid. 106 and 801 (d)(1)(b) in holding that the Trial Court abused its discretion by refusing to admit an unqualified hearsay opinion?

ALL PARTIES TO THE PROCEEDING IN THE LOWER COURT

1. Lieutenant Commander John C. Rainey

2. Mrs. Rondi M. Knowlton

3. Beech Aircraft Corporation

4. Beech Aerospace Services, Inc.

5. Pratt & Whitney Canada, Inc.

6. United Technologies Corporation is the parent corporation of Pratt & Whitney Canada, Inc.

7. Raytheon Corporation is the parent corporation of Beech Aircraft Corporation.

8. There are no subsidiaries or affiliates of Beech Aircraft Corporation except Beech Aerospace Services, Inc.

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1. Original Panel Opinion of the United States Court of Appeals for the Eleventh Circuit, 784 F.2d 1523 (11th Cir. 1986) (Johnson, J. concurring specially). (Appendix App. 1-15)

2. Eleventh Circuit Opinion granting a rehearing en banc, and vacating prior panel opinion. 791 F.2d 833 (11th Cir. 1986). (Appendix App. 16-17)

3. En Banc Opinion of the United States Court of Appeals for the Eleventh Circuit, 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., concurring specially). (Appendix App. 18-63)

STATEMENT OF JURISDICTION

This Court has Certiorari jurisdiction pursuant to 28 U.S.C. 1254 (1). The en banc judgment of the Eleventh Circuit Court of Appeals was entered on September 22, 1987. No Petition for Rehearing was filed.

STATUTORY PROVISIONS AT ISSUE

1.) **Federal Rule of Evidence 803. Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) **Public Records and Reports.** Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . . (c) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2.) **Federal Rule of Evidence 106. Remainder of or Related Writings or Recorded Statements.**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3.) **Federal Rule of Evidence 801(d)(1)(B). Statements which are not Hearsay: Prior Statement by Witness.**

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—

(1) **Prior Statement by Witness.** The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is. . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

STATEMENT OF THE CASE

On July 13, 1982, Lieutenant Commander Barbara Ann Rainey, a Navy flight instructor and her student, Ensign Donald Bruce Knowlton, were killed in an aircraft crash near Middleton Field, Alabama. Their respective spouses instituted wrongful death actions in the United States District Court for the Northern District of Florida. These actions sought money damages pursuant to the Florida Wrongful Death Act from Beech Aircraft Corporation, ("Beech") Pratt & Whitney Canada, Inc. ("Pratt & Whitney") and Beech Aerospace Services, Inc. ("BASI"), see, Fla. Stat. §768.16 et seq. (1985). The Plaintiffs alleged that the pneumatic fuel control system in the T-34C trainer aircraft was defective in its design and/or manufacture, causing the engine to suffer a loss of power.

Following a two-week jury trial, a verdict was returned in favor of the Defendants. Plaintiffs appealed challenging two evidentiary rulings by the District Court. They claimed that the trial judge improperly applied Fed. R. Evid. 803(8)(C) by admitting certain evaluative conclusions contained in a trustworthy Judge Advocate General (JAG) report. The disputed evaluative conclusions were contained in an investigative report of the air crash prepared by Lieutenant Commander William C. Morgan. This JAG report was prepared at the direction of Lieutenant Colonel Habermacher, the commanding officer of Rainey's Training Squadron, pursuant to the Manual of the Judge Advocate General (JAG) §0902, at 9-3 to 9-5.

After investigating the matter over a period of six (6) weeks, Morgan prepared a written report. The report contained a six page summary of the accident and sixty attachments consisting of One Hundred Fifty Nine (159) pages. Morgan's conclusions, as contained in the summary, were later endorsed by six Naval officers. One of the conclusions reached by Lieutenant Commander Morgan was that "The most probable cause of the accident was the pilots [sic] failure to maintain proper interval". Morgan also found that no mechanical irregularities could be specified as a contributing cause of the accident. After consideration and editing by the Trial Judge, specific portions of Morgan's findings were admitted as evidence pursuant to Fed. R. Evid. 803(8)(C).

Plaintiffs also asserted on appeal that the Trial Court improperly limited the cross-examination of Plaintiff, Lieutenant Commander John Charles Rainey.[1] At trial, Rainey was called by the defense as an adverse witness. On direct he was questioned concerning factual admissions contained in a letter which he had written to the investigating JAG officer after the accident.[2] These questions were limited to facts in the letter regarding unnecessary pressure on the pilots, and the final flight maneuvers of the aircraft. During direct examination, Rainey, as an adverse party, was never

[1]Barbara Ann Rainey's surviving spouse, John Charles Rainey, was also a Lieutenant Commander in the United States Navy.

[2]Plaintiff, Mrs. Rondi M. Knowlton also signed the letter which Mr. Rainey prepared following his unofficial inquiries and investigation.

asked whether his letter contained his opinion as to the cause of the crash.

On cross-examination by his counsel, Rainey was permitted to testify that he had not attempted to influence the testimony of the JAG officer nor any witness. The Trial Court, however, refused to allow Rainey to testify that his letter also contained his opinion that the "most probable primary cause of this mishap was rollback". The Plaintiffs alleged that this limitation on Rainey's testimony was error.

On appeal, the Eleventh Circuit Court of Appeals reversed as to each of the evidentiary rulings. The panel concluded that it was bound by prior Fifth Circuit precedent, construing Fed. R. Evid. 803(8)(C), to exclude evaluative conclusions contained in public investigative reports made pursuant to law. See *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).[3] On this authority the Court held that it was error to admit the selective evaluative conclusions contained in Lieutenant Commander Morgan's investigative report of the subject accident. See *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986). Circuit Judge Johnson specially concurred in the panel opinion urging the Court to accept jurisdiction, en banc, to reconsider this interpretation of Rule 803(8)(C). In his concurrence, he characterized *Smith v. Ithaca* as "an anomaly among the circuits", and urged the entire court to adopt the

[3]In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions issued prior to September 30, 1981. Such precedent can only be overruled en banc by a majority of the Eleventh Circuit Judges. *Id.* at 1212.

majority rule favoring admissibility of evaluative conclusions contained in trustworthy public reports. *Rainey,* 784 F.2d at 1530.

The Panel also reversed on the second ground because it felt that the Trial Court improperly limited the cross-examination of Commander Rainey. The Panel held that the Rule of Completeness, as embodied in Fed. R. Evid. 106, required that Rainey be afforded an opportunity to testify as to his opinion on causation which was contained in his unsolicited post accident letter to JAG Officer Morgan. The Court also found that Rainey's statements on cross examination by his counsel regarding the contents of his letter should have been admitted as prior consistent statements pursuant to Fed. R. Evid. 801(d)(1)(B).

Each defendant filed a Petition for panel re-hearing and re-hearing en banc. On May 27, 1986, the Eleventh Court of Appeals vacated the panel opinion and ordered briefing and re-hearing en banc. *Rainey v. Beech Aircraft Corp.*, 791 F.2d 833 (11th Cir. 1986) On September 22, 1987, the Court issued its en banc per curiam opinion holding that Commander Morgan's investigative report was a trustworthy public record of an investigation conducted pursuant to law. However, the en banc Court was dead-locked, six-six, on the issue of whether evaluative conclusions contained in such reports are admissible pursuant to Fed. R. Evid. 803(8)(C). See *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987). Following the venerable evenly divided rule, the court was constrained to follow the decision articulated in the panel opinion, which excluded the evaluative conclusions of Commander Morgan. On the second point,

the Court was in agreement that the case should be reversed because the Trial Court improperly limited the cross-examination of Commander Rainey.

STATEMENT OF LOWER COURT'S JURISDICTION

The Lower Court had diversity jurisdiction of this matter pursuant to 28 U.S.C. 1332. (1976)

REASONS FOR GRANTING THE WRIT

A. THE ELEVENTH CIRCUIT'S CONSTRUCTION OF FED. R. EVID. 803(8)(C) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The several Circuits are divided 10 to 2 in their efforts to fashion an appropriate interpretation of Federal Rule of Evidence 803(8)(C). To litigants the rule is a critical and inexpensive evidentiary tool which provides for the admission of public reports resulting from investigations made pursuant to law. The controversy among the Circuits is whether the phrase *"factual findings"* as used in the rule, includes *evaluative conclusions* derived from investigative reports. See *Rainey*, 827 F.2d at 1508. In the case at bar, the en banc Court was evenly divided and was thus unable to provide its own interpretation of Rule 803(8)(C). See *Rainey*, 827 F.2d at 1501. Instead, the Court was forced to adopt existing Fifth Circuit precedent, which holds that evaluative conclusions contained in trustworthy public reports are not

admissible. *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1981).[4] By adopting *Smith's* narrow interpretation of the rule, the Eleventh Circuit joined the Fifth Circuit in direct conflict with every other Circuit which has spoken to the issue. See *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975); *Robbins v. Whelan*, 653 F.2d 47 (1st Cir. 1981) cert denied 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), cert denied 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Melville v. American Home Assurance Corp.*, 584 F.2d 1306 (3rd Cir. 1978); *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984); *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978); *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986); *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613 (8th Cir 1983); *Plummer v. Western International Hotels Co.*, 656 F.2d 502 (9th Cir. 1981); *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986). In fact, the interpretation of Rule 803(8)(C) adopted by the Eleventh Circuit is in conflict with a prior decision of this Court. See *Chandler v. Roudebush*, 425 U.S. 840, 48 L.Ed.2d. 416 and 96 S.Ct. 1949 (1976). In *Chandler*, this Court held that prior administrative findings in an employment discrimination case are admissible, pursuant to Rule 803(8)(C), in a subsequent federal trial on the same claim. The reasoning expressed in *Chandler* was

[4]The Court reached this conclusion notwithstanding the fact that two separate Judges specially concurred calling the *Smith* opinion an "anomaly among circuits", and urging the Court to adopt a rule favoring broad admissibility of evaluative conclusions contained in investigative public reports. See *Rainey v. Beech Aircraft*, 784 F.2d 1523 (11th Cir. 1986) (Johnson, J., specially concurring) and *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., specially concurring).

adopted in *Cohen v. General Motors*, 534 F.Supp. 509 (W.D. Mo. 1982), wherein the Court admitted conclusory findings by the National Highway Traffic Safety Administration (NHTSA). In so doing, the Court expressly rejected the reasoning in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), noting that this Court, in *Chandler*, had "given a broad directive for liberal use of agency findings." *Cohen*, 534 F. Supp. at 512. See also, *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978).

In summary the Fifth and Eleventh go one way while the United States Supreme Court and the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits go another.[5] This direct conflict has produced

[5]The confusion surrounding the appropriate interpretation of Fed. R. Evid. 803(8)(C) is so great that intra-Circuit conflict exists regarding the admissibility of evaluative conclusions contained in investigative public reports. See, *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2nd Cir. 1980) (FDA Medical Opinions not admissible under 803(8)(C)). *Compare Litton Systems, Inc. v. American Telephone & Telegraph*, 700 F.2d 785 (2nd Cir. 1983) (admitting FCC conclusions regarding unreasonable telephone tariffs pursuant to 803(8)(C)). In fact, although the Eleventh Circuit felt compelled to follow Fifth Circuit precedent excluding evaluative conclusions in public reports, the Fifth Circuit itself has admitted such conclusions pursuant to 803(8)(C) on several occasions. See e.g., *Matthews v. Ashland Chemical, Inc.* 770 F.2d 1303 (5th Cir. 1985); *McClure v. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985); *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543 (5th Cir. 1982); *Local Union No. 59 v. Namco Electric, Inc.*, 653 F.2d 143 (5th Cir. 1981); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) cert denied 499 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977) *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975). As these cases illustrate, the pervasive nature of the conflict regarding Rule 803(8)(C) is such that disagreement exists among several Circuits regarding its appropriate interpretation.

confusion and diametrically opposed rulings on a Rule of Evidence which was intended to be uniform. Thus, compare *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1983):

> Although there has been some disagreement over whether "evaluative" public records or reports were intended by Congress to be considered "factual findings" for the purposes of Fed. R. Evid. 803(8)(C), it is well established that the phrase should be interpreted broadly. Thus, the fact that the CDC [Center for Disease Control] and Tri-State studies contain tentative conclusions as well as statistical findings does not affect the applicability of the rule.

Ellis, 745 F.2d at 301, with the conclusion reached by the Court in *Smith v. Ithaca*, 612 F.2d 215 (5th Cir. 1981):

> . . . we find the Coast Guard report sufficiently trustworthy to justify the district court's admission of the reports findings of fact. There was no reason for the Coast Guard to have been other than objective. Under *Complaint of American Export Lines*, however, evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence.

Smith, 612 F.2d at 222 (5th Cir. 1980) (Relying on *Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D. N.Y. 1977) *accord*, *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987) (excluding from evidence evaluative conclusions contained in a police internal affairs

investigation).[6] As these cases illustrate, the Circuit Courts of this country are sharply divided on the issue of whether evaluative conclusions contained in trustworthy investigative reports are admissible pursuant to Rule 803 (8)(C). This conflict will continue to persist, and cases will continue to be decided with different results unless this Court resolves the issue.

The existing conflict with Rule 803(8)(C) is creating particularly acute problems in the Eleventh and Fifth Circuits, where jurors are routinely being denied access to opinions contained in trustworthy public reports. In short, the Fifth and Eleventh Circuits are excluding admission of these evaluative conclusions even though both Circuits readily admit that the investigative reports use sound methodology and are trustworthy public records. See *Rainey*. 827 F.2d at 1516, *Smith*, 612 F.2d at 222. As a result, the manner in which many cases are being decided depends in large part on the Circuit in which they are pending. Such divergent outcomes result in fundamental unfairness and serves to encourage forum shopping among litigants. Given the increasing frequency with which public reports of investigatory proceedings appear in litigation, it is a virtual certainty that this problem will re-occur and

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[6] In *McQuaig*, the Court noted that other Circuits had declined to follow the Fifth Circuit's interpretation of Federal Rule of Evidence 803(8)(C). The Court, however, noted that it was compelled to follow *Smith v. Ithaca*, until overruled by the Supreme Court or the Fifth Circuit En Banc. *McQuaig*, 806 F.2d at 1302, Note 4.

continue to escalate until this Court resolves the conflict.[7]

B. THE ELEVENTH CIRCUIT HAS ADOPTED A CONSTRUCTION OF RULE 803(8)(C) WHICH IS INCONSISTENT WITH THE PURPOSE AND INTENT OF THE RULE.

Federal Rule of Evidence 803(8)(C) was designed to admit as weighable evidence, trustworthy public reports of official investigations conducted pursuant to law. *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498 (11th Cir. 1987) (Tjoflat, J., specially concurring). This is consistent with the Advisory Committee Notes to the rule, which urge that trustworthy public reports of official investigations should be admitted in the first instance. See Rule 803(8)(C) *advisory committee note,*

[7]Evaluative conclusions in public reports of investigations prepared pursuant to law are appearing in litigation with great frequency and in a variety of contexts. See *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986) (report of Shooting Review Board); *Ellis v. International Playtex,* 745 F.2d 292 (4th Cir. 1984) (epidemiological studies authored by Federal Center for Disease Control) *Complaint of Paducah Towing Co.,* 692 F.2d 412 (6th Cir. 1982) (Administrative Law Judge's findings regarding reasonableness of captain's action in marine accident); *Baker v. Elcona Homes,* 588 F.2d 551 (6th Cir. 1978) (police report determining that traffic control sign was red); *United States v. School District of Ferndale, Michigan,* 577 F.2d 1339 (6th Cir. 1978) (Findings of HEW examiner regarding segregation of school system); *Chandler v. Roudebush,* 425 U.S. 840, 48 L.Ed.2d 416, 96 S.Ct. 1949 (1976) (prior administrative findings as to employment discrimination claim); *Melville v. American Home Assurance Company,* 584 F.2d 1306 (3rd Cir. 1978) (FAA airworthiness directives).

and *Melville,* 584 F.2d at 1316. The Advisory Committee suggests that such admissibility is warranted because the rule provides "ample provisions for escape if sufficient negative factors are present." Fed. R. Evid. 803 *advisory committees note.* Thus, the focus of the Trial Court's analysis under 803(8)(C) should be on the relative trustworthiness of a report and not on the weight to be given by the fact finder to the evaluative conclusions of the investigative officer. See *Kehm v. Proctor & Gamble Manufacturing Company,* 724 F.2d 613 (8th Cir. 1983) (". . . once a report is conclusively shown to represent findings of a public agency made pursuant to an investigation authorized by law, the central inquiry becomes whether the report is trustworthy") *Id.* at 618. This interpretation of Fed. R. Evid. 803.(8)(C) releases trial judges from drawing "arbitrary lines between fact and opinion, and focuses the Court's inquiry instead on the trustworthiness and relevance of the reports in question." *Rainey v. Beech Aircraft Corporation,* 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially). If the report is found to be a trustworthy public record of an investigation conducted pursuant to law, then it should be received in the same manner as other evidence, for consideration and weighing by the jury.

In the case at bar, the en banc Court held that the disputed Judge Advocate General's Report was trustworthy public record of an investigation made pursuant to law.[8] *Rainey,* 827 F.2d at 1516 ("a majority

[8]This conclusion was entirely appropriate given that Plaintiffs made no attempt to depose Commander Morgan, call him as a witness at trial, discredit his qualifications or attack the methodology employed in his investigation. *Rainey,* 827 F.2d at 1508.

of this court agrees that Lieutenant Commander Morgan's investigative report is a public record and that it is trustworthy for purposes of 803(8)(C)"). *Id.* at 1516. The Court nevertheless concluded that it was error to admit those portions of the report which contained evaluative conclusions. It is respecfully submitted that this restrictive interpretation of Rule 803(8)(c) is incorrect. The history and purpose of this rule, along with the overwhelming weight of authority indicate that public investigative reports should be admitted for factfinder consideration, along with the other evidence, if sufficient indicia of trustworthiness exists.

> There is no reason not to admit the findings simply because they tend towards the conclusory rather than the factual end, unless, as 803(8)(C) further provides, the sources of information or other circumstances indicate lack of trustworthiness.

Kehm v. Proctor & Gamble Manufacturing Company, 724 F.2d 613, 618 (8th Cir. 1983). (quoting in part from *United States v. American Telephone & Telegraph Co.,* 498 F.Supp. 353,360 (D. D.C. 1980). *See also, Litton Systems, Inc. v. American Telephone & Telegraph,* 700 F.2d 785, 818 (2nd Cir. 1983). *Melville v. American Home Assurance Corp.,* 584 F.2d 1306 (3rd Cir. 1978); *Ellis v. International Playtex, Inc.,* 745 F.2d 292 (4th Cir. 1984); *Baker v. Elcona Homes Corp.,* 588 F.2d 551 (6th Cir. 1978); *Baz v. Walters,* 782 F.2d 701 (7th Cir. 1986); *Kehm v. Proctor & Gamble Manufacturing Co.,* 724 F.2d 613 (8th Cir 1983); *Plummer v. Western International Hotels Co.,* 656 F.2d 502 (9th Cir. 1981); *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir. 1986). This rule favoring admissibility is premised on the fact that public

reports of investigations performed pursuant to authority granted by law are presumptively valid. See *Rainey,* 827 F.2d at 1514. *Melville,* 584 F.2d at 1316. Fed. R. Evid. 803 *advisory committee note.* Normally, the investigators employ well accepted methodology and typically, their investigations are performed at or near the time of the incident in question. *Rainey,* 827 F.2d at 1512, 1513 (Tjoflat, J. concurring). *Ellis v. International Playtex,* 745 F.2d at 301. Respectfully, the jury simply should not be denied access to such evidence because the report contains evaluative conclusions. This result is entirely consistent with the overall treatment of opinion evidence under the Federal Rules of Evidence.

> Rule 803(8) should be interpreted in accord with the treatment of opinion evidence. If the report states a conclusion that would be helpful and is reliable, it should be admitted.

Rainey, 827 F.2d at 1515. (Tjoflat, concurring) (quoting from 4. J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8) [03] (1985)). See also, Fed. R. Evid. 704 ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.")

The Eleventh Circuit's restrictive interpretation of Federal Rule of Evidence 803(8)(C) is not warranted by the language, history or purpose of this Rule. The weight of authority, as well as simple logic, dictates that if an evaluative conclusion in an investigative report is helpful to the trier of fact, it should be admitted as long

as it satisfies the necessary requirements of trustworthiness.

C. FEDERAL RULE OF EVIDENCE 106 IS DESIGNED TO COVER AN ORDER OF PROOF PROBLEM, IT DOES NOT RENDER OTHERWISE INADMISSIBLE EVIDENCE ADMISSIBLE.

After the subject accident, LCDR Rainey wrote to LCDR William C. Morgan, the Judge Advocate General Officer assigned to investigate the air crash. This letter was written after Mr. Rainey had conducted his own informal investigation into the circumstances surrounding the matter. On direct examination, as an adverse party, Mr. Rainey was questioned about factual admissions contained in his letter. (App. 71-78) The examination was limited to questions regarding his written statements about the mental status of the pilots and the final flight path of the aircraft. As one would expect, Mr. Rainey was never asked his opinions as to the cause of the tragic accident. (App. 71-78)

On cross-examination, Rainey was asked by his counsel whether his letter also stated that "the most probable primary cause of this mishap was rollback". The trial court sustained the objections to this question on the ground that Rainey had not been properly qualified to render an expert opinion.[9] (App. 78-81)

[9]It should be noted that the Plaintiffs never attempted, at any point during the trial, to qualify Rainey as an expert in the fuel flow mechanics of the PT-6-A25 engine, nor did they call Rainey in chief or rebuttal.

The Eleventh Circuit Panel reversed this evidentiary ruling concluding that Rainey should have been permitted to testify regarding those portions of his letter dealing with his opinion as to causation. The Panel opined that such testimony was admissible pursuant to the Rule of Completeness as embodied in Federal Rule of Evidence 106. This Rule provides:

> When a writing or recorded statement or part thereof is introduced by a party, and adverse party may require him, at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106. *United States v. Costner,* 684 F.2d 370, 373 (6th Cir. 1982) ("The Rule of Completeness has been codified in Fed. R. Evid. 106") Respectfully, for the reasons which follow, the Eleventh Circuit's construction and application of Federal Rule of Evidence 106 was incorrect and inconsistent with established authority on this issue.

The Rule of Completeness as codified is designed to regulate order of proof and cannot be utilized to admit evidence which is otherwise inadmissible. *United States v. Woolbright,* slip opinion, 86-2414 (8th Cir. 1987); *United States v. Costner,* 684 F.2d 370 (6th Cir. 1980); *United States v. Terry,* 702 F.2d 299 (2nd Cir. 1983); *United States v. Burreson,* 643 F.2d 1344 (9th Cir. 1981); J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8)[03](1985). By way of illustration, the Sixth Circuit in *United States v. Costner,* noted:

> The rule covers an order of proof problem, it is not designed to make something admissible which should be excluded (Citations omitted).

684 F.2d at 373. A party simply may not use Fed. R. Evid. 106 as a side door guise for offering otherwise inadmissible testimony. See *United States v. Terry,* 702 F.2d at 314 (". . . in any event, Rule 106 does not render admissible evidence which is otherwise inadmissible.")

In the present case, the Rainey letter was hearsay, and was thus not admissible as evidence. See Fed. R. Evid. 801(c), 802. The Defense utilized Rainey's statements on direct examination as factual admissions against the adverse party-author's interest, pursuant to Fed. R. Evid. 801(d)(2)(A). The Plaintiffs, however, offered no corresponding exception to the hearsay rule to support Rainey's unqualified self-serving opinion as to the probable cause of the accident. As a result, the Eleventh Circuit misapplied Fed. R. Evid. 106 by allowing the Plaintiffs to utilize this Rule to admit otherwise inadmissible hearsay testimony. Compare *Costner,* 684 F.2d at 373 and *Terry,* 702 F.2d at 314.

Federal Rule of Evidence 106 is also inapplicable in the present case because the disputed testimony was not offered to explain or qualify those portions of the letter which were utilized during Rainey's direct examination. *United States v. Crosby,* 713 F.2d 1066 (5th Cir. 1983). See *United States v. Walker,* 652 F.2d 708 (7th Cir. 1981); *United States v. Soures,* 736 F.2d 81 (3rd Cir. 1984). Gainsaid, the direct examination of Rainey was strictly limited to Rainey's own statement of facts concerning

the final flight maneuvers of the aircraft and the pilot's state of mind as contained in his letter. The opinion concerning probable cause, which counsel sought to elicit from Rainey on cross examination was beyond the scope of direct examination, and did not tend to explain or qualify his previous testimony. This question was simply designed to elicit from Rainey an unqualified opinion duplicating his expert's earlier opinions and general theory of the case. Indeed, had his opinion been admitted, it would have been repetitious and redundant. The admissibility of such testimony cannot be supported by Fed. R. Evid. 106. *United States v. Greene,* 497 F.2d 1068, 1082 (7th Cir. 1974); *United States v. Marin,* 669 F.2d 73 (2nd Cir. 1982) ("completeness doctrine does not require introduction of portions of statement that are neither explanatory of nor relevant to the admitted passages"). *Id.* at 84.

Resort to the Rule of Completeness was also unjustified because the Plaintiffs never invoked Fed. R. Evid. 106 to support admission of Rainey's hearsay opinion as to probable cause. In fact, the first mention of this Rule was in the original Eleventh Circuit Panel opinion. However, the plain language of Rule 106, as well as the case law construing it, all indicate that the Rule is not self-executing. *United States v. Larranga,* 787 F.2d 489 (10th Cir. 1986). Therefore, if fairness requires that an entire document be introduced, the time to do so is when the opposition introduces a part thereof. A failure to invoke Rule 106 in a timely fashion results in a waiver of its application. *Hill v. Nelson,* 676 F.2d 1371 (11th Cir. 1982), *United States v. Soulard,* 730 F.2d 1292 (9th Cir. 1984); *21 C. Wright & K. Graham, Federal Practice and Procedure* §5076 (1978) (request to invoke

Fed. R. Evid. 106 should be specific, timely and appear of record.)

In a footnote, the Panel also incorrectly concluded that the defense utilized portions of the Rainey letter as prior inconsistent statements pursuant to Fed. R. Evid. 801 (d)(1)(A). See *Rainey,* 784 F.2d at 1529 (footnote 12). With this false premise as its foundation, the Panel held that Rainey's statement regarding probable cause should have been admitted as a prior consistent statement. See Fed. R. Evid. 801(d)(1)(B). This determination was incorrect as these two rules of evidence have no application in the present case.

The statements contained in Rainey's letter were admitted solely as admissions against a party opponent. See Fed. R. Evid. 801(d)(2)(A). They were neither offered nor admitted as prior inconsistent statements, and the panel's conclusion to the contrary misconstrues Rainey's testimony.

Prior inconsistent statements may only be offered where the declarant has made a statement under oath which is inconsistent with his testimony at trial. See 801(d)(1)(A). In the instant case, the statements in Rainey's letter were not made under oath and his testimony on direct was entirely consistent with his prior statements. See *United States v. Day,* 789 F.2d 1217 (6th Cir. 1986). As a result, the rule of evidence regulating admission of prior inconsistent statements was wholly inapplicable, and, respectfully, the panel's conclusion to the contrary was, erroneous.

Having apparently formed a belief that Rainey was impeached with prior inconsistent statements, the panel concluded that his opinion on probable cause should have been admitted as a prior consistent statement. Fed. R. Evid. 801 (d)(1)(B). However, such statements are only available to rehabilitate an impeached witness who has been charged with a recent fabrication or an improper motive. *United States v. Weil,* 561 F.2d 1109 (4th Cir. 1977); *Hill v. Nelson,* 676 F.2d 1371 (11th Cir. 1982). In the present case, Rainey was neither charged expressly or impliedly, with a recent fabrication or an improper motive. In fact, his testimony on direct was entirely consistent with his previous statements regarding this accident. *4 J. Weinstein and M. Berger, Weinstein's Evidence* §801(D)(1)(B)[01] (1985) ("Rule 801(D)(1)(B) should apply only when there is some suggestion . . . that the witness consciously altered his testimony after making the inconsistent statement by which he has been impeached.") Since Rainey had not been charged with a recent fabrication or change in his story, there was no predicate for the admission of Rainey's opinion on probable cause as a prior consistent statement. The Eleventh Circuit's conclusion to the contrary is in error.

CONCLUSION

The premises and reasons considered, Petitioner, Beech Aircraft Corporation, respectfully prays that the Writ be issued; the en banc opinion of the Court of Appeals be vacated and the Final Judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that three true and correct copies of the foregoing Petition and Appendix have been served this 15th day of December, 1987 on: Mr. Dannis Larry and Mr. Donald Partington, 715 S. Palafox Street, Pensacola, Fla. 32573, Counsel for the Plaintiffs/Respondents, Mr. Robert P. Gaines, P.O. Box 12950, Pensacola, Fla. 32576, Counsel for Pratt & Whitney, and Mr. William H. F. Wiltshire, 201 E. Government Street, Pensacola, Fla. 32598, Counsel for BASI.

KIMBRELL & HAMANN, P.A.

By: Jos. W. Womack
Jos. W. Womack, Esq.

Appendix

[1523]

John C. RAINEY, individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

* * *

[1525] PER CURIAM:

Barbara Ann Rainey and Donald Bruce Knowlton died on July 13, 1982 in a fiery plane crash at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act,

Fla.Stat. §§ 768.16-.27 (1985), in district court.[1] The jury returned a verdict against Rainey and Knowlton. We hold that the trial judge committed reversible error in two evidentiary rulings and remand for a new trial.

I.

On July 13, 1982 Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, was issued a T-34C Turbo-Mentor aircraft, number 3E955, for a training exercise at Middleton Field, Alabama. Her student was Ensign Donald Bruce Knowlton. Ensign Knowlton was to practice "touch and go" landings and takeoffs.[2] There were five aircraft in the "touch and go" pattern.

Witnesses testified that Ensign Knowlton, after successfully completing four "touch and go" patterns, began "climbing out low; that is, below the standard altitude, and slow, slower than the 100 knots or 90 knots that the aircraft should have been at." Witnesses also

[1]Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton sued individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton. By order dated March 20, 1984 the two cases were consolidated "for all purposes including consolidation for trial."

[2]A "touch and go" is a training exercise employed to familiarize students with takeoffs and landings. After takeoff, the student circles the airfield in an oval or racetrack pattern and then lands the aircraft. Upon landing, the student does not stop the craft, but accelerates to take off again.

testified that Ensign Knowlton made an early crosswind turn; this early turn prompted two radio transmissions. Captain Charles E. Guthrie, a flight instructor riding in another aircraft in the pattern, cautioned Lieutenant Commander Rainey:[3] "Aircraft turning crosswind, you're cutting somebody out." Similarly, Lieutenant Colonel David I. Habermacher, Jr., a flight instructor in the aircraft forced out of the pattern, transmitted the warning: "Aircraft turning crosswind, you're cutting us out. Heads up."

Lieutenant Commander Rainey did not verbally respond to these radio transmissions. Witnesses testified, however, that following these transmissions Lieutenant Commander Rainey's aircraft banked sharply to the right. While the threatened midair collision with Lieutenant Colonel Habermacher's aircraft was thus avoided, the aircraft piloted by Lieutenant Commander Rainey rapidly lost altitude, crashed in a wooded area two miles southeast of Middleton Field, and burned. Neither Lieutenant Commander Rainey nor Ensign Knowlton survived the crash.

On July 14, 1982 Lieutenant Colonel Habermacher directed Lieutenant Commander William C. Morgan, Jr. to conduct an informal investigation into the circumstances surrounding the crash. On September 1,

[3]It is, of course, impossible to determine whether Lieutenant Commander Rainey or Ensign Knowlton was in control of the aircraft at this time. Witnesses knowledgeable in flight instruction, however, testified that Lieutenant Commander Rainey, a trained pilot and flight instructor, would, under these circumstances, assume control over the aircraft.

1982 Lieutenant Commander Morgan reported, in writing, his findings of fact, opinions and recommendations pursuant to the requirements established by the Judge Advocate General. Lieutenant Commander [1526] Morgan's report lists as an opinion that pilot error was "[t]he most probable cause of the accident."

Rainey and Knowlton disagree with Lieutenant Commander Morgan's opinion. In a letter written to Lieutenant Commander Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, the malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight. Knowlton agreed with Rainey's conclusion and on April 15, 1983 Rainey and Knowlton filed separate suits in the United States District Court for the Northern District of Florida, alleging negligence and strict product liability causes of action. Beech Aircraft Corporation, the manufacturer of the T-34C Turbo-Mentor aircraft, Pratt and Whitney Canada, Inc., the manufacturer of the engine incorporated into the T-34C aircraft, and Beech Aerospace Services, Inc., the United States Navy's contract maintenance service for the T-34C aircraft, were named as defendants.

At trial, the only disputed issue was the cause of the fatal crash. Because both Lieutenant Commander Rainey and Ensign Knowlton were not available to

testify and because the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants also relied on the opinions contained in the investigative report prepared by Lieutenant Commander Morgan. Pointing to Lieutenant Commander Morgan's opinion that pilot error was the most probable cause of the crash, the defendants argued that they should not be held responsible. The jury agreed.

On August 1, 1984 Rainey and Knowlton, complaining about two of the trial judge's evidentiary rulings, filed a motion for a new trial.[4] The judge denied the motion. This appeal promptly followed.

II.

The district court admitted into evidence, over Rainey and Knowlton's objection, excerpts from the investigative report prepared by Lieutenant Commander Morgan.[5] On appeal, Rainey and Knowlton

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[4]Rainey and Knowlton objected to the admissibility of several opinions contained in Lieutenant Commmander Morgan's investigative report. Rainey and Knowlton also objected to the restriction of Rainey's trial testimony. These objections are now raised on appeal.

[5]On March 20, 1984, at the pretrial conference, the district court ruled that Lieutenant Commander Morgan's report was trustworthy and admissible but "only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned." On July 10, 1984, the day before trial, the district court reversed in part its prior ruling. At that time, the judge decided to admit into evidence the opinions and conclusions contained in the investigative report.

argue that many of the excerpts from the investigative report, specifically Lieutenant Commander Morgan's opinions, should not have been admitted into evidence because these opinions did not fall within the public records exception to the general hearsay rule.[6]

(Footnote 5 Continued)

In light of the court's ruling, Rainey and Knowlton requested an opportunity to review Lieutenant Commander Morgan's report and "leave, in the event we so decide, to call as a witness such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion [that pilot error was the "most probable cause" of the crash] and the trustworthiness of it." The district court granted the request.

[6]The following opinions were admitted into evidence:

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

* * *

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

[1-3] To be admissable, the excerpts from Lieutenant Commander Morgan's report [1527] must satisfy the hearsay exception for public records and reports. *See* Fed.R. Evid. 803(8). Rule 803(8) provides a hearsay exception in civil actions for "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Lieutenant Colonel Habermacher, with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander Morgan to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Moreover, because no evidence was introduced to show that the report lacked trustworthiness, we find that the report was indeed trustworthy.[7] Thus, the factual findings contained in the report are admissible under Rule 803(8).

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[7]The Advisory Committee on the Proposed Rules notes that Fed.R.Evid. 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803(8) advisory committee note. Thus, the burden was upon Rainey and Knowlton to show that the report was inadmissible because its sources of information or other relevant circumstances indicated a lack of trustworthiness. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975)). That burden was not met here.

Rainey and Knowlton argue that they were unable to meet their burden because they were surprised by the district court's ruling the day before trial admitting into evidence Lieutenant

[4] Cases interpreting Rule 803(8), however, disclose a difference of opinion as to the meaning of "factual findings." *Compare Complaint of American Export Lines, Inc.*, 73 F.R.D. 454, 458 (S.D.N.Y. 1977) (evaluative conclusions or opinions are not "factual findings"); *with Complaint of Paducah Towing Co.*, 692 F.2d 412, 420 (6th Cir. 1982) (evaluative reports are admissable as "factual findings" if based upon circumstantial evidence) (citation omitted).[8] In deciding how to interpret "factual findings" in the context of this

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(Footnote 7 Continued)

Commander Morgan's opinions. But Rainey and Knowlton knew months before trial that the defendants would seek to admit Lieutenant Commander Morgan's report into evidence. Still, Rainey and Knowlton made no effort to attack the qualifications of Lieutenant Commander Morgan or the methodology he employed in conducting the investigation. In fact, when the trustworthiness of the report was discussed during the pretrial conference, Rainey and Knowlton admitted that there was no evidence to indicate that the report was untrustworthy.

On July 10, 1984 when the judge decided to admit the opinions into evidence, he granted Rainey and Knowlton leave to review the report and, if they so chose, to present evidence concerning the trustworthiness of the opinions. Rainey and Knowlton presented no such evidence, and did not seek a continuance.

Thus, in light of the fact that there was no evidence presented to show that the report lacked trustworthiness we agree with the district court in finding that the report was trustworthy.

[8]The legislative history of the Rule reveals the origins of the conflict. The House Committee on the Judiciary intended that " 'factual findings' be strictly construed and that evaluations or conclusions contained in public reports shall not be admissible under this Rule." H.R.Rep. No. 93-650, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7075, 7088. On

case, we are bound by the Fifth Circuit's interpretation in *Smith v. Ithaca Corp.*, [1528] 612 F.2d 215 (5th Cir. 1980).[9] In *Smith*, the Fifth Circuit considered the admissibility of a Coast Guard Marine Board of Investigation Report and found that the "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. The Fifth Circuit noted that:

> the language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule

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(Footnote 8 Continued)

other hand, the Senate Committee on the Judiciary took "strong exception to this limiting understanding of the application of the rule." S.Rep. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7051, 7064. The Senate Judiciary Committee recommended a liberal interpretation of "factual findings" so as to include "evaluative reports." *Id.* The Advisory Committee on the Proposed Rules also suggested that "factual findings" might encompass evaluative reports. *See* Fed.R.Evid. 803(8) advisory committee note.

[9]The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

801(d)(1)(A) and admissible against Knowlton as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). Mr. Larry sought to question Rainey about paragraph five of the letter. Rainey and Knowlton contend that Rainey's statement in paragraph five should have been ruled admissible under Fed.R.Evid. 801(d)(1)(B) as "a prior consistent statement made by him offered to rebut an implied or express charge that in other parts of his letter he had made statements inconsistent with his trial theory." Brief for Appellants at 28-29. We agree.

> 803(6) when contained in the record of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

612 F.2d at 221-22 (citations omitted). Thus, while the defendants urge us to follow "[t]he prevailing view . . . that all evaluative conclusions are within the scope of Rule 803(8)(C)," *Walker v. Fairchild Industries*, 554 F.Supp. 650, 653 (D.Nev. 1982) (citations omitted); *see also Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 (W.D.Mo. 1982) ("it appears that the more expansive reading [of Rule 803(8)] is gaining favor") (citations omitted), we are not free to do so. The Fifth Circuit in *Smith* clearly launched this court's precedent in a different direction, a direction we must follow. We therefore hold that the district court erred in admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's report.

Having concluded that the district court erred in admitting into evidence these evaluative conclusions and opinions, we must now determine whether this error was harmless. *See Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980). We hold that it was not.

[5] Several of Lieutenant Commander Morgan's opinions touched on the cause of the aircraft crash—the ultimate issue the jury was to decide. These opinions were submitted to the jury without ever having been tested by cross-examination. Moreover, the defendants

were able to capitalize on the improper admission of these opinions by highlighting the opinions to the jury during closing argument. The jury returned a verdict for the defendants but the improper admission of Lieutenant Commander Morgan's opinions may have influenced this verdict. The admission of these opinions, therefore, cannot be considered harmless. The district court committed reversible error; Rainey and Knowlton must be afforded a new trial.

III.

Another issue raised by this appeal is whether the district court improperly restricted Rainey's trial testimony. A.H. Toothman, counsel for Beech Aircraft Corporation, called Rainey as an adverse witness. Rainey was questioned about the letter he had written to Lieutenant Commander Morgan about the "aircraft mishap." The questions concerned paragraphs two and four of the letter. In paragraph two, Rainey had written that before the training exercise, his wife, Lieutenant Commander Rainey, was under "unnecessary" pressure. According to Rainey, his wife had attempted to cancel the exercise "[o]n three separate occasions," and "was observed to terminate [one] conversation in an uncharacteristically heated and disgusted manner." In paragraph four, Rainey had written that the aircraft piloted by his wife violated "pattern integrity . . . as it turned crosswind without proper interval." [1529] Rainey had also admitted that either his wife or Ensign Knowlton "react[ed] instinctively and abruptly by initiating a hard right turn, away from [the aircraft piloted by Lieutenant Colonel Habermacher]." Because these statements tended to support the defendants' theory that pilot error led to the crash, the district court,

over Rainey and Knowlton's objection, permitted Mr. Toothman's inquiry.

During Rainey's cross-examination, however, the district court sustained the defendants' objection to the following question propounded by Dennis K. Larry, counsel for Rainey and Knowlton: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" The district court did not allow the question, holding that the question improperly sought to elicit an opinion from a non-expert witness. On appeal, Rainey and Knowlton argue that the district court improperly excluded Rainey's testimony.[10] We agree.

A district court's evidentiary rulings are discretionary and "will not be disturbed on appeal absent a clear showing of an abuse of discretion." *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983) (citations omitted). Under this standard, we must conclude that the district court committed reversible error in limiting Rainey's testimony.

[10]Federal Rule of Evidence 103(a)(2) cautions that error may not be predicated upon a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir.) (quoting Fed.R.Evid. 103(a)(2)), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979); *see also* 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶103[03] (1985). While Rainey and Knowlton failed to make an offer of proof indicating the substance of Rainey's excluded testimony, the substance of the testimony was readily apparent from the language of the question the defendants objected to.

Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is based on the "rule of completeness," and seeks to avoid the unfairness inherent in "the misleading impression created by taking matters out of context."[11] Fed.R.Evid. 106 advisory committee note.

Here, Rainey was questioned about a letter he had written to Lieutenant Commander Morgan. The defendants questioned Rainey about several statements in this letter that, in isolation, seemed to support the defendants' position that pilot error caused the crash. Mr. Larry, counsel for Rainey and Knowlton, sought to place these statements in perspective by questioning Rainey about paragraph five of the letter. In paragraph five, Rainey had concluded that "[t]he most probale [sic] primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction." This statement would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone.

[6-8] The court, therefore, erred in permitting the defendants to examine Rainey about portions of his

[11]Technically, Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence. Here, we find the defendants' questions concerning Rainey's letter tantamount to the introduction of the letter into evidence. We therefore apply the concerns of the Rule—fairness and completeness—to this case.

letter while prohibiting cross-examination about other relevant portions.[12] Because paragraph five of the letter would have harmonized the prior [1530] statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of completeness" embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial.

IV.

We hold that the trial judge committed reversible error in 1) admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's investigative report and 2) limiting Rainey's trial testimony. We therefore reverse the judgment entered against Rainey and Knowlton and remand for a new trial.

REVERSED AND REMANDED.

JOHNSON, Circuit Judge, concurring specially:

I concur with the panel's opinion in this case. I write separately to urge that, while we are clearly bound by *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), to hold that the evaluative conclusions contained in Lieutenant Commander Morgan's report are not

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[12]The district court's limitation of Rainey's testimony was erroneous for another reason as well. As Rainey and Knowlton noted, the district court permitted the defendants' inquiry into Rainey's letter, finding the statements in the letter admissible against Rainey as a prior inconsistent statement under Fed.R.Evid.

admissible under Fed.R.Evid. 803(8)(c), our interpretation of this rule is ripe for reconsideration.

Smith is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(c)'s "factual findings" standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir. 1984) ("[I]t is well established that the phrase should be interpreted broadly"). Weinstein's evidence treatise advocates such a reading, *Weinstein on Evidence* § 803(8)[03] (1985) ("[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted"), and the Advisory Committee's Note may be read as consonant with this interpretation, *Id.*

Broad admissibility releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question. This case presents an appropriate opportunity for reconsideration of this critical evidentiary issue by the full Court.

(Footnote 12 Continued)
801(d)(1)(A) and admissible against Knowlton as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). Mr. Larry sought to question Rainey about paragraph five of the letter. Rainey and Knowlton contend that Rainey's statement in paragraph five should have been ruled admissible under Fed.R.Evid. 801(d)(1)(B) as "a prior consistent statement made by him offered to rebut an implied or express charge that in other parts of his letter he had made statements inconsistent with his trial theory." Brief for Appellants at 28-29. We agree.

[833]

John C. RAINEY, individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft Of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

May 27, 1986.

* * *

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 25, 1986, 11th Cir., 1986, 784 F.2d 1523)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the above-consolidated causes shall be reheard by this Court en banc *without* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs. The previous panel's opinion is hereby VACATED.

[1498]

John C. RAINEY, individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant.

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt and Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

Sept. 22, 1987.

* * *

[1499] Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, Circuit Judges.

PER CURIAM:

This case was taken *en banc* for the purpose of reconsidering controlling authority in this Circuit concerning the admissibility in evidence of an opinion expressed in an investigative report of an airplane crash. The Court is evenly divided on the issue, however, so that the controlling authority remains as set forth in the panel decision. Since the Court is unanimous in upholding the panel's decision on the other evidentiary issue which requires a reversal for a new trial, the effect of this *en banc* procedure is to reinstate the panel opinion. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986). This opinion will simply review the case and the effect of this decision.

[1500] Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign Donald Bruce Knowlton died on July 13, 1982 in a fiery airplane crash while practicing landings and takeoffs at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla. Sta.Ann § 768.16-.27 in district court. The jury returned a verdict against the plaintiffs.

At trial, the only disputed issue was the cause of the fatal crash. Lieutenant Colonel David I. Habermacher, Jr., with authorization from the Manual of the Judge

Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander William C. Morgan, Jr. to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Because no evidence was introduced to show that the report lacked trustworthiness, the factual findings contained in the report are admissible under Rule 803(8). *Rainey*, 784 F.2d at 1527. In his report, however, Morgan also gave his opinion that pilot error was "[t]he most probable cause of the accident." *Id.* at 1526.

Rainey and Knowlton disagreed with Lieutenant Commander Morgan's opinion. In a letter written to Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight.

Because the two people in the plane were killed and the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants offered into evidence the opinion contained in the investigative report prepared by Lieutenant Commander Morgan.

[1, 2] Two points are raised on appeal. *First*, plaintiffs contend that John Charles Rainey's testimony

was unduly restricted on cross-examination by his own attorney about his letter to Morgan after counsel for Beech Aircraft Corporation had called Rainey as an adverse witness. The panel opinion fully sets forth the circumstances concerning this issue and concludes the district court should be reversed for two reasons: (1) Fed.R.Evid. 106 requires the court to let Rainey testify as to the whole letter and, (2) the testimony was admissible under Fed.R.Evid. 801(d)(1)(B). *Rainey*, 784 F.2d 1528-30. The Court is unanimous in concluding that the panel opinion is correct in reasoning and result, so no further discussion of the issue is in order here.

Second, Rainey and Knowlton appeal the district court's decision to admit into evidence, over their objection, the opinion as to cause of the accident in the investigative report prepared by Lieutenant Commander Morgan. Morgan did not testify at the trial. The panel held that prior precedent of this Court, found in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), requires that the district court be reversed on this point. *Rainey*, 784 F.2d at 1527-28. *Smith* holds that "evaluative conclusions and opinions," such as those contained in Lieutenant Commander Morgan's report, are not admissible. 612 F.2d at 221-22. The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. Judge Johnson specially concurred in the panel opinion, noting that although *Smith* controlled the panel decision, it should be reconsidered *en banc*. *Rainey*, 784 F.2d at 1530.

Although this case was taken *en banc* for the purpose of reconsidering the evidentiary [1501] issue

decided in *Smith*, the Court is evenly divided on the point. Judges Roney, Godbold, Hill, Fay, Vance and Clark would all adhere to *Smith*. Judges Tjoflat, Kravitch, Johnson, Hatchett, Anderson and Edmondson would follow the reasoning suggested in Judge Johnson's concurring opinion and overrule *Smith*.

Since the Court is evenly divided, there is no useful purpose in the publication of opinions setting forth the reasoning of either view. All judges agree that unless *Smith* is changed by the *en banc* court, it controls the issue in the district court. Since it takes a majority of the *en banc* court to change a prior precedent of this Court, *Smith* controls and the panel opinion properly decides the issue.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring, in which JOHNSON, Circuit Judge, joins:

I concur in the en banc court's judgment in this case, reversing the district court because it improperly restricted the cross-examination of John Charles Rainey. The second issue in this case is whether the evaluative conclusions contained in Lieutenant Commander (LCDR) Morgan's investigative report are admissible under Fed.R.Evid. 803(8)(C).[1] I write

[1]Fed.R.Evid. 803(8)(C) provides as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

separately to urge the court to take its place among the majority of our sister circuits, favoring broad admissibility under Rule 803(8)(C)'s "factual findings" standard. Were we to adopt the majority view, I submit that we would hold that the district court in this case properly admitted the evaluative conclusions contained in the investigative report.

I.

On July 13, 1982, LCDR Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign (ENS) Donald Bruce Knowlton, died in a fiery airplane crash while practicing "touch and go" landings and takeoffs[2] at Middleton Field in Alabama. The day after the crash, Lieutenant Colonel (LCOL) Habermacher of the United States Marine Corps, the Commanding Officer of LCDR Rainey's training squadron, under authority of the Manual of the Judge

(Footnote 1 Continued)

* * *

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

[2]A "touch and go" pattern is a training exercise in which, after takeoff, the student circles the airfield in an oval pattern and then lands the aircraft; after landing, the student does not stop the plane but instead accelerates and takes off again.

Advocate General § 0902, at 9-3 to 9-5, appointed LCDR William C. Morgan, Jr. to investigate the aircraft accident.[3]

On September 1, 1982, LCDR Morgan, pursuant to the requirements established [1502] by the Judge Advocate General, filed a written report with LCOL Habermacher. Accompanying LCDR Morgan's investigative report were sixty documents, termed "enclosures," consisting of 159 pages. The enclosures included the following documents: summaries of LCDR Rainey's naval flight and medical records and of ENS Knowlton's aviation and medical records; Training Squadron Three's flight schedule for July 13, 1982; history and inspection records, including an outstanding maintenance action form, of the aircraft that crashed;

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[3]The letter appointing LCDR Morgan to investigate the crash reads, in full, as follows:

From: Commanding Officer, Training Squadron THREE

To: LCDR William C. MORGAN, Jr., USN, 1310

Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which occurred at approximately 1020, 13 July 1982, approximately two miles southeast of Middleton Airport in Evergreen, Alabama.

Ref: (a) JAG Manual Chapter VI and Section 0902, Chapter IX

1. You are appointed to conduct an informal investigation in accordance with reference (a), as soon hereafter as practicable, for the purpose of inquiring into all circumstances surrounding the aforementioned accident.

2. You will conduct a thorough investigation into all the circumstances surrounding [sic] the accident and report your

air traffic control records; statements from the other instructors and students who were engaged in the "touch and go" exercise, as well as statements from other witnesses to the crash; crash crew rescue reports; aerial photographs of the crash site; casualty reports; the engineering investigative report on the aircraft's engine; photographs of the plane's wreckage; statements

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(Footnote 3 Continued)

findings of fact, opinions and recommendations as to the following:

a. The cause of the accident.

b. The possibility of administrative or disciplinary action.

c. Any claims for or against the U.S. Navy resulting therefrom.

d. Be advised that no statement taken by you need be subscribed under oath.

3. By copy of this appointing letter, the squadron Administrative Department is directed to furnish you assistance in preparing the report of your investigation.

4. This report will be completed no later than 13 August 1982. If additional time is required, you will submit in writing to the Commanding Officer the reasons for and the amount of additional time required.

/s/ D.I. HABERMACHER, JR.

On August 12, 1982, LCDR Morgan "requested that the due date for the informal investigation directed by reference (a) be extended for 14 days subsequent to the receipt of the autopsy protocol and toxicology reports and the results of the engineering investigation." On August 13, 1982, LCOL Habermacher approved LCDR Morgan's request.

from the spouses of the crash victims; diagram of the Middleton Field traffic pattern; and copies of the autopsy protocol and toxicology reports of LCDR Rainey and ENS Knowlton. Based on the sixty enclosures and on his investigation, LCDR Morgan prepared a six-page summary, including a preliminary statement, findings of fact, opinions, and recommendations. That summary is reproduced here in full:

PRELIMINARY STATEMENT

1. As directed by enclosure (1) and in accordance with reference (a), an informal investigation was conducted into the circumstances surrounding the aircraft accident which occurred Southeast of Middleton Airport near Evergreen, Alabama, on 13 July 1982.

2. All reasonably obtainable evidence has been compiled and examined during the course of the investigation and all directives of the convening authority have been met. Certain real evidence collected by the Aircraft Accident Board was also obtained, however, considerable care was taken to ensure a separate and accurate investigation.

3. All claims and potential claims for damages by landowners have been investigated. The original claim of Mr. William W. Ward has been hand carried to Naval Legal Service, Pensacola, Florida. No estimates were required with this claim based on a phone conversation with LCDR G.F. Indest of the Naval Legal Service in Pensacola, Florida. The other property owner involved, Mr. Roger Warrick of Gauiter, Mississippi, has been

notified of the accident and furnished Standard Form 95 by registered mail.

4. Several witnesses were found that heard the radio transmissions and saw the aircraft just prior to the crash. They all seemed rational and observant. Witnesses interviewed were not designated as parties to the investigation and all were advised of the nature of the JAG investigation.

5. The unusual length of time required to complete this investigation was due to the delay in receiving the autopsy reports on the two pilots and the delay in receiving the engineering investigation on the engine of aircraft 3E955. Additional delays were due to the research required to validate points brought out in the engineering investigation.

FINDING OF FACT

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau [1503] number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama, (enclosure (3)).

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981, (enclosure (4)). At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified (enclosure (5)) as well as being a qualified familiarization instructor, (enclosure (6)). As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were

logged in the T-34C aircraft. LCDR Rainey had logged 96.2 hours during the 90 days preceeding [sic] the accident, (enclosure (7)). LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations, (enclosure (8)).

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE on 24 May 1982 for duty as a Student Naval Aviator, (enclosure (9)). He had an average flight grade of 2.94 and had accumulated 4.5 hours in the T-34C aircraft, (enclosure (10)).

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (11)).

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (12)).

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight, (enclosure (13)).

7. Aircraft 160955, a T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records, history, and logs revealed that all required maintenance inspections and technical directives had been complied with, (enclosure (14)). There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken, (enclosure (15)).

8. Aircraft Technical Directive No. T-34C-017 which was designed to provide a manual back-up system for fuel metering, (enclosure 16)), was not installed, (enclosure 14)). Although much has been written about the need for a manual fuel control, (enclosures (17), (18), (19), (20) and (21)), it is still not installed in the T-34C aircraft, (enclosure (14)).

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet thereby assuming the responsibility of pilot in command, (enclosure (22)).

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show that aircraft 160955 (3E955) departed North Whiting Field at 0915 local under VFR conditions, (enclosure (23)).

11. The weather observed indicated no conditions that would have a direct effect on the flight, (enclosure (24)). Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south, (enclosures (25), (26), (27) and (28)).

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident, (enclosure (28)).

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned, (enclosures (25), (27), (29), (30), (31) and (32)).

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site, (enclosures (27), (28) and (29)).

15. The [wreckage] of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site, enclosure (41)).

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash [1504] site required that the crash crew and other vehicles cross property owned by Mr. William W. Ward, (enclosure (42)).

17. During transit to the crash site, the crash crew had difficulty in locating the [wreckage] due to the muddy road conditions and the circuitous route required to go around a small stream and follen [sic] trees. Additionally, there were no current, detailed maps of the local area available to the crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the [wreckage], (enclosures (27), (28), (31) and (33)).

18. ABH1 R.S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the [wreckage] of 3E955, (enclosure (28)).

19. LT Ted J. Choley stated that at approximately 1030 local, he received a call from LT Will Carpenter on base

radio stating that there was an accident at Middleton Field, (enclosure (36)).

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field, (enclosure (37)).

21. Upon arrival at the [wreckage] at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABH1 Scribner's call to crewmembers of the aircraft. The burned bodies of both pilots were noted at this time, (enclosures (27), (28), (34) and (35)).

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it, (enclosures (27), (28), (31), (34) and (35)). At 1042 local, all fires were extinguished with the exeption of a magnesium fire which the crash crew was unable to put out, (enclosure (38)).

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period, (enclosures (52) and (55)).

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact, (enclosures (52) and (56)).

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the from [sic] cockpit harness failed, (enclosure 50)).

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to the activated position, (enclosure (51)).

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power, (enclosure (48)).

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field, (enclosure (39)). The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local, (enclosure (33)).

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors, (enclosures (43), (44) and (45)).

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-1N launched and proceeded to the crash site, arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the [wreckage], placed in body bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local, and arrival at NARMC was at 1515 local. The remains were taken from the helicopter and placed in an

ambulance for transportation to the hospital, (enclosure (40)).

31. An Engineering Investigaton was conducted on the engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida, (enclosure (48)).

[1505]

OPINIONS

1. Examination of the findings of fact, aircraft history, and inspection records indicate [sic] no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings "on the numbers". After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up

caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Rainey reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available.

6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a "rollback" did occur.

7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval [between LCDR Rainey's aircraft and another aircraft in the pattern].

8. There are many items that are considered as possible contributing factors to the accident. They are listed as follows:

a. The design of the aircraft which limits forward visability [sic] when in a climb.

b. The performance of the engine from idle to max power and the associated lag.

c. The relative size of the individuals, ENS Knowlton's size and strength could enable him to overpower LCDR Rainey in a panic situation.

d. The possibility that an LPA (life preserver assembly) was inflated at a critical time.

e. The inability of early stage students to trim correctly.

9. The Middleton Crash Crew and the RDO (Runway Duty Officer) acted in a very professional manner.

[1506]

RECOMMENDATIONS

1. That the claim of Mr. William W. Ward be honored.

2. That a flight for the NATOPS syllabus be designed to familiarize all pilots with the different type stalls that may be encountered.

3. That landing lights be used in the landing pattern to enhance visibility of aircraft established downwind.

4. That every effort be made to incorporate Aircraft Technical Directive No. T-34C-0147 at the earliest possible date.

/s/ W.C. Morgan, Jr.

In letters to the Judge Advocate General of the United States Navy, the following officers endorsed LCDR Morgan's investigative report: the Commanding Officer of Training Squadron Three (LCOL Habermacher), the Commanding Officer of Training Squadron Five, the Chief of Naval Education and Training, and the Chief of Naval Operations. In addition, two other officers sent endorsement letters to LCOL Habermacher. Although a few endorsers took issue with some of LCDR Morgan's recommendations,

none disagreed with any of his opinions that were admitted into evidence.

Disagreeing with LCDR Morgan's opinion that pilot error was "[t]he most probable cause of the accident," the spouses of the crash victims, John Charles Rainey and Rondi M. Knowlton, filed separate suits on April 15, 1983 in the district court against the manufacturer of the aircraft, Beech Aircraft Corporation, the manufacturer of the aircraft's engine, Pratt & Whitney Canada, Inc., and the Navy's contract maintenance service for the aircraft, Beech Aerospace Services, Inc.[4] Each plaintiff alleged negligence and strict product liability causes of action and sought money damages under the Florida Wrongful Death Act, Fla.Stat. §§ 768.16-.27 (1985). Specifically, Rainey and Knowlton each alleged that "[t]he aircraft and engine were equipped with a pneumatic fuel control system which was defective in its design and/or manufacture in that it was prone to malfunction in such [a] way as to cause 'power interruptions' . . . such that the pilot of the subject aircraft was unable to sustain sufficient power to maintain flight." The spouses alleged that Beech Aircraft and Pratt & Whitney were negligent in designing and manufacturing the aircraft and engine in that they knew or should have known of the defects; they alleged that Beech Aerospace Services, Inc. was negligent when it issued to LCDR Rainey an aircraft

[4]Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton brought suit individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton.

that it knew or should have known had a defective fuel control system. Both Rainey and Knowlton sought punitive damages against the defendants, contending that they acted "in reckless disregard for the safety of decedent and other persons who they knew would fly the aircraft." At a pretrial conference on March 20, 1984, the district court granted Beech Aircraft's motion to consolidate the two cases for all purposes, including trial.

During that same pretrial conference, the district court held that LCDR Morgan's investigative report was trustworthy and that his factual findings, but not his opinions or conclusions, would be admissible. On July 10, 1984, during a hearing held the day before trial, the district court reversed in part its prior ruling on the admissibility of LCDR Morgan's report. The court reiterated that "the defendants [could] place in evidence before the Jury the findings of facts, 31 in number, that were in the JAG report." The court further held "that the opinions attached to those 31 findings may also be admitted, to the extent that they are opinions and conclusions." According to the district court, however, not every "opinion" in LCDR Morgan's report was admissible under Fed.R.Evid. 803(8)(C):

> Paragraph five is nothing but a possible scenario, as it's called, and would not [1507] be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

Accordingly, the district court held that paragraph five, eight, and nine of the report's "opinions" section would not be allowed into evidence at trial.[5]

The plaintiffs objected to the district court's new ruling on the admissibility of the JAG report, citing *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).[6] In light of the court's ruling, the plaintiffs requested an opportunity to review the JAG report for the purpose of offering evidence and witnesses relating to LCDR Morgan's "Opinion" No. 7 (which appears to be based on "Finding of Fact" No. 13): "The most probable cause of the accident was the pilots [sic] failure to maintain proper interval." The district court granted the plaintiffs' request.

The only disputed issue at trial was the cause of the fatal crash. The parties relied heavily on opinions of expert witnesses. The defendants relied in part on excerpts from the opinions contained in LCDR Morgan's investigative report.[7] The following "opinions" from that report were admitted into evidence:

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[5] *See infra* note 7.

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[7] The trial exhibits are not part of the record on appeal. Although the court has before it a complete copy of LCDR Morgan's investigative report, which presumably was included in the record on appeal as an exhibit to a memorandum filed in support of a motion, I can only assume, as the parties agree, that the portions of the report that the district court on July 10, 1984 ruled would

1. Examination of the findings of fact, aircraft history, and inspection records indicate [sic] no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. Thre is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

* * *

7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval.

(Footnote 7 Continued)

be admissible at trial were actually admitted into evidence. I therefore assume that all 31 of the report's findings of fact were admitted into evidence, along with all of the report's opinions except paragraphs five, eight, and nine. (I also assume that the district court struck the opinion in paragraph six, which deals with the possibility that a "rollback" caused the accident, because that opinion can only be read along with paragraph five, which the district court explicitly held inadmissible during the July 10, 1984 pretrial conference.) Additionally, a colloquy between the trial judge and the parties' lawyers, outside the presence of the jury, indicates that the court also admitted into evidence the maintenance record of the plane that crashed; that record was attached to LCDR Morgan's report.

On July 20, 1984, the jury returned a verdict for the defendants, finding that the deaths of LCDR Rainey and ESN Knowlton were not legally caused by the aircraft's fuel control system, and that there was no negligence on the part of Beech Aircraft, Pratt & Whitney, or Beech Aerospace that legally caused the deaths of LCDR Rainey and ENS Knowlton.

On August 1, 1984, the plaintiffs filed a motion for a new trial, challenging two of the trial judge's evidentiary rulings. The district court denied the motion, and this appeal followed.

A panel of this court reversed the district court, holding that the district court improperly restricted plaintiff Rainey's trial testimony and that it improperly admitted into evidence, contrary to precedent of this court found in *Smith v. Ithaca Corp.*, 612 [1508] F.2d 215 (5th Cir. 1980), the opinions contained in LCDR Morgan's investigative report. We took the case en banc to consider both evidentiary issues, thereby vacating the panel's opinion and judgment by operation of law. *See* 11th Cir.R. 26(k). I write now to urge that the en banc court reject the holding of *Smith* and affirm the district court's ruling admitting into evidence the opinions contained in LCDR Morgan's investigative report.

II.

To be admissible, an investigative report of the sort prepared by LCDR Morgan must satisfy the hearsay exception for public records and reports found in Fed.R.Evid. 803(8)(C). That rule provides a hearsay exception for "[r]ecords, reports, statements, or data

compilations, in any form, of public offices or agencies, setting forth . . . in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8)(C). As to the rule's public record requirement, the en banc court holds that LCDR Morgan's investigative report is a public record: it was prepared in conjunction with an authorized Judge Advocate General investigation.

As to the rule's caveat that certain findings of a public record are admissible unless the sources of the information that lead to the findings or other circumstances indicate that such sources were untrustworthy, there is no evidence in the record that would indicate that the sources upon which LCDR Morgan relied lacked trustworthiness. The burden was on the plaintiffs to show that the report was inadmissible if they believed that its sources of information or other circumstances indicated that the reported lacked trustworthiness. *See* Fed.R.Evid. 803(8) advisory committee's note (Rule 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present"); *see also Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3rd Cir. 1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.* 519 F.2d 1178 (5th Cir. 1975)). Although the plaintiffs knew months before trial that the defendants would seek to admit LCDR Morgan's investigative report into evidence, they attacked neither the qualifications of LCDR Morgan nor the methodology he employed. During the July 10, 1984 pretrial conference, the plaintiffs requested leave to review the report to determine whether to present

evidence bearing on the trustworthiness of the report's opinions. The district court granted the plaintiffs' request, but they presented no evidence challenging the report's trustworthiness and did not seek a continuance to gather such evidence. The plaintiffs have not met their burden. For these reasons, this court cannot, and does not, set aside the district court's findings that the report is trustworthy.

The issue that divides us is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C), encompasses evaluative conclusions derived from the report. The panel that heard this appeal answered in the negative, concluding that it was bound by the former Fifth Circuit's interpretation of "factual findings" in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527-28 (11th Cir. 1986) (per curiam). In a separate concurring opinion, Judge Johnson described *Smith* as "an anomaly among the circuits" and urged the en banc court to reject the *Smith* court's reasoning and to adopt a rule favoring broad admissibility of evaluative conclusions contained in investigative reports that are trustworthy public records and are relevant to the issues in question. *See id.* at 1530 (Johnson, J., concurring specially). I agree with Judge Johnson.

III.

In *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), the former Fifth Circuit considered the admissibility under Fed.R.Evid. [1509] 803(8)(C) of excerpts from a Coast Guard Marine Board of Investigation Report. Acknowledging that the

legislative history of the rule does not unambiguously resolve the issue and that the federal courts have disagreed over the appropriate interpretation of "factual findings", the *Smith* court reached this conclusion:

> [T]he language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the records of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

Id. at 221-22 (citing *Complaint of Am. Export Lines, Inc.*, 73 F.R.D. 454, 457 (S.D.Y.Y. 1977)).[8] Accordingly, the *Smith* court held that "evaluative conclusions and opinions of the Coast Guard Marine Board of

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[8]Fed.R.Evid. 803(6) provides as follows:

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted

Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. In my view, the *Smith* court misinterpreted "factual findings" within the meaning of Rule 803(8)(C), unduly limiting the rule's scope.

A.

A literal reading of Rule 803(8)(C) hardly lends itself to a restrictive interpretation. The rule creates a hearsay exception for trustworthy public reports "setting forth . . . factual findings resulting from an investigation." Fairly read, the rule admits not merely "factual findings," but reports in their entirety, as long as the reports are trustworthy and contain factual findings. After all, this hearsay exception is entitled "public records and reports," not "factual findings set forth in public records." *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1143 (E.D. Pa. 1980) ("The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings. . . ."), *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

(Footnote 8 Continued)

> business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Advisory Committee Notes support this reading of the rule. The Committee couched its discussion in terms of the admissibility of evaluative reports.[9] Although the Committee understood that the rule "assumes admissibility in the first instance,' it believed that the rule provides "ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803 advisory committee's note. The Committee offered a nonexclusive list of "[f]actors which may be of assistance in passing upon the admissibility of evaluative reports":

> (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? [1510] 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

Fed.R.Evid. 803 advisory committee's note. Notably, the Committee did not even mention the possibility that admissibility would be limited to those portions of evaluative reports that present "factual findings."

The House Judiciary Committee "approved Rule 803(8) without substantive change from the form in

[9]Evaluative reports under Rule 803(8)(C) "are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." Fed.R.Evid. 803 advisory committee's note.

which it was submitted by the [Supreme] Court." Report of the Committee on the Judiciary, H.R.Rep. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin.News 7075, 7088. The Committee, however, adopted a somewhat tortured reading of the public records .heresay exception: "The Committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." *Id.* That reading is tortured not only because it erroneously focuses on the admissibility of factual findings contained in public reports, rather than on, as the Rule says, public records "setting forth . . . factual findings resulting from an investigation," but also because it contorted the meaning of "factual findings."

A "finding" is "[a] decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc." *Black's Law Dictionary* 569 (5th ed. 1979). That is, a finding "commonly applies to the result reached by a judge or jury." *Id.* In other words, a "finding" or a "finding of fact" refers to the result or conclusion drawn by an investigator, whether it be a fire inspector, judge, or jury, "from facts without exercise of legal judgment." *Id.* The common meaning of finding therefore comports with investigative conclusions (i.e., results derived from the examination of facts), but not with idle speculation or legal conclusions: "a finding does not include legal conclusions that may have been reached by an investigator and is necessarily something more than a mere recitation of evidence, although we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of an investigator." *Zenith Radio Corp.*, 505 F.Supp. at 1144 (footnote

omitted). Thus, by way of example, the following investigative (or evaluative) conclusions are "factual findings": whether a traffic light was green or red (there were no eyewitnesses) moments before an automobile accident, *see Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.CT. 2054, 60 L.Ed.2d 661 (1979); whether a public school board had established and maintained an elementary school as a black school for segregative purposes, *see United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1354-55 (6th Cir. 1978); whether a state trooper who fatally shot a man who attacked him acted within the guidelines of the department's Policies and Procedures Manual, *see Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir. 1986); whether a state trooper acted contrary to department training when he attempted to handcuff a person while holding a cocked weapon, *see Wilson v. Beebe*, 770 F.2d 578, 589-90 (6th Cir. 1985) (en banc); whether a crewmember of a ship started a fight, *see Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1182-83 (3d Cir.) *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978); whether the captain of a tow boat acted reasonably in mooring the vessel and setting the watch, *see In re Paducah Towing Co.*, 692 F.2d 412, 419-21 (6th Cir. 1982); whether there is a statistically significant link between tampon use and toxic shock syndrome, *see Ellis v. International Playtex, Inc.*, 745 F.2d 292, 299-304 (4th Cir. 1984); and whether a phone company's tariffs were unreasonable and discriminatory, *see Litton Systems, Inc. v. AT & T*, 700 [1511] F.2d 785, 819 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

The Senate Judiciary Committee rejected the House Committee's narrow interpretation of "factual

findings," opting instead for the Advisory Committee's view:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

* * *

> The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish[es] sufficient guidance on the admissibility of evaluative reports.

Report of the Committee on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Admin.News 7051, 7064-65.[10]

The Conference Committee did not resolve the differing views of the term "factual findings." The Conference Committee Notes make no reference to the scope of Rule 803(8) or to the meaning of "factual findings." *See Notes of Conference Committee*, H.R. Conf.Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin.News 7098; *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

The legislative history as to the admissibility of evaluative conclusions is indeed equivocal. Nevertheless, the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence, and is more easily

[10]The Senate and House versions of Rule 803(8) differed slightly. The Senate version referred to another proposed rule, relating to the admissibility of certain criminal law enforcement records and reports. That reference was deleted by the Conference Committee, which adopted the House's version of the rule. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* 803-23 (1985); *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 n. 6 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

justified on policy grounds. *See United States v. AT & T*, 498 F.Supp. 353, 359 (D.D.C. 1980) ("Extrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position.").

Rule 803(6), the regular entries rule, creates a hearsay exception for reports or records "of acts, events, conditions, opinions, or diagnoses . . . if kept in the course of a regularly conducted business activity . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed.R.Evid. 803(6). Because Rule 803(6) uses the [1512] terms "opinions" and "diagnoses" whereas Rule 803(8)(C) uses the term "factual findings," the *Smith* court inferred that Congress must have intended that those terms have distinct meanings and, more specifically, that "factual findings" not encompass evaluative conclusions. *See Smith v. Ithaca Corp.*, 612 F.2d 215, 221-22 (5th Cir. 1980). The *Smith* court reached this erroneous result, I believe, because it apparently gave no credence to the Advisory Committee's Note on Rule 803(6).

Tracing the origins of the regular entries rule, the Advisory Committee noted that "[e]ntries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results." Fed.R.Evid. 803 advisory committee's note. The Committee acknowledged, however, that the Commonwealth Fund Act, 28 U.S.C. § 1732, the Uniform Business Records as Evidence Act, Model Code Rule 514, and Uniform Rule 63(13) contained limiting

and ambiguous language with respect to diagnosis, test results, and opinions. Thus, according to the Advisory Committee, "[i]n order to make clear its adherence to the [trend toward freely admitting diagnostic entries,] the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries." Fed.R.Evid. 803 advisory committee's note.[11]

Given this account of why the regular entries rule makes explicit reference to diagnoses and opinions, it strikes me as absurd to cite the language of that rule as support for an argument limiting the scope of "factual findings" within the meaning of the public records rule. The reason that the regular entries rule specifically mentions "diagnoses" and "opinions" has nothing whatsoever to do with why Rule 803(8) employs the term "factual findings." If anything, attributing a severely restricted significance to the phrase "factual findings" would be inconsistent with the regular entries rule: "No legislative history points to any intent on the part of Congress to limit the public records exception [Rule 803(8)] so as to exclude records which had previously qualified for admission pursuant to the business entries exception [Rule 803(6)]." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(8) [03] (1985) (citation omitted).

In addition, "[b]road admissibility [under Rule 803(8)(C)] releases trial judges from the duty to draw

[11]The House Committee Notes, the Senate Committee Notes, and the Conference Committee Notes do not discuss the significance of Rule 803(6)'s use of the terms "opinions" and "diagnoses" or how the scope of those terms differs from the scope of "factual findings," as used in Rule 803(8)(C).

sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir. 1986) (Johnson, J., concurring specially); *see also* Fed.R.Evid. 704(a) ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier-of-fact."). Thus, consistent with the basic approach that opinions should be admitted when helpful to the trier of fact, *see* Fed.R.Evid. 704 advisory committee's note, trustworthy and relevant evaluative opinions should be admitted under the public records exception of Rule 803(8)(C), as long as jurors can ascertain the significant facts that form the basis of the opinion. *See* 4 J. Weinstein & M. Berger, *supra*, ¶ 803(8) [03].

B.

Broad admissibility of public records containing evaluative conclusions (i.e., normative judgments drawn from the analysis of facts) is good policy because these reports are presumptively reliable. Rule 803(8)(C) is premised on "the assumption that a public official will perform his duty properly [1513] and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. 803 advisory committee's note (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir.1952)). Admission of public records can be justified "by the probability that the officials conducting the investigation (who themselves are under a public duty) will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings and conclusions." G. Lilly, *An Introduction to*

the Law of Evidence 245 (1978). Most investigators under a public duty lack a motive to distort the facts or their conclusions. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir.1984); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *see also Melville v. American Home Assurance Co.*, 443 F.Supp. 1064, 1112 (E.D.Pa.1977), ("[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial."), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir.1978).

Dean McCormick offered several other reasons for allowing a trier of fact to receive an investigative report—including the investigator's conclusions based on the facts he has gathered—as evidence:

> The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by the parties. The officer, too, is frequently a specialist—a doctor reporting death, a fire marshall investigating a fire—or at least experienced in like investigations, such as a highway patrolman reporting on a collision.

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 Iowa L.Rev. 363 (1957).

Because the source of these public reports—an investigator operating under authority of law—is presumptively reliable, "there is no reason not to admit the findings simply because they tend towards the conclusory rather than the factual end." *United States v. AT & T*, 498 F.Supp. 353, 360 (D.C.C.1980); *see also Zenith Radio Corp. v. Matsushita Elec. Indus, Co.*, 505 F.Supp. 1125, 1144 (E.D.Pa.1980) ("[F]actual statements need not be formally termed 'findings' in order to come in under 803(8)(C)."), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 583 (1986).

The presumption that evaluative reports of this sort are trustworthy is, of course, rebuttable. Not every public report made pursuant to an investigation authorized by law that contains factual findings will be admissible. Rule 803(8)(C) allows for the admission of evaluative reports "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8)(C). In other words, "if sufficient negative factors are present" to indicate that the report is not trustworthy, then it should not be admitted. Fed.R.Evid. 803(8) advisory committee's note. "The factors that may be used to determine admissibility include: (1) the timeliness of the investigation; (2) the special skill or experience of the official; and (3) possible motivation problems." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir.1984) (citing Fed.R.Evid. 803(8)(C) advisory committee's note); *see also Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir.1986). The court's consideration of such negative factors provides an exclusionary mechanism sufficient to safeguard against the admission of unreliable

evidence. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978).

The burden to demonstrate that an investigative report is not reliable is on the party opposing admission of the report. [1514] *Ellis*, 745 F.2d at 301 (citing *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618 (8th Cir.1983); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 558 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979)). As a practical matter, this makes a good deal of sense:

> Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis, 745 F.2d at 301.

C.

Rule 803(8) must be viewed in conjunction with the other rules of evidence. Accordingly, the admissibility of Rule 803(8)(C) public records of an evaluative nature, which in most cases are prepared by experts, should be interpreted broadly so that Rule 803(8)(C) is consistent with Rule 703, which provides that facts forming the basis of an expert's opinion need not themselves be

admissible as long as they are "of a type reasonably relied upon by experts in the particular field." Fed.R.Evid. 703;[12] *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1148 (E.D.Pa.1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Furthermore, although public records are excepted from the hearsay evidence rule because they are presumed generally to be reliable, the reliability of a particular evaluative report can be tested not only with the trustworthiness inquiry called for by Rule 803(8)(C), but also with the objections permitted by Rules 702 and 705. *See Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Rule 702 allows objections to the qualifications of an expert witness,[13] and Rule 705 allows disclosure on cross-examination of facts and data

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[12]Fed.R.Evid. 703 provides in full as follows:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[13]Fed.R.Evid. 702 provides as follows:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

underlying an expert's testimony.[14] Of course, an evaluative report admissible under Rule 803(8) may have to be excised in part under Rules 401 and 402, providing that irrelevant evidence is inadmissible,[15] and

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[14]Fed.R.Evid. 705 provides as follows:

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citation and footnote omitted), the Third Circuit noted the following:

Before these objections [under Rules 702 and 705] may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come forward with some evidence which would impugn its trustworthiness. To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).

[15]Fed.R.Evid. 401 provides as follows:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed.R.Evid. 402 provides as follows:

under rule 403, excluding relevant evidence [1515] on grounds of prejudice, confusion, or waste of time.[16]

In sum, "Rule 803(8) should be interpreted in accord with th[e] treatment of 'opinion' evidence. If the report states a conclusion that would be helpful—and is reliable—it should be admitted." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶803(8)[3](1985) (footnote omitted.) This determination is a matter to be left within the sound discretion of the district court. The court would thus be "free to say, pursuant to Rule 803(8)(C), 'In this particular case and in view of the shaky foundation for the conclusions, I will exclude the report unless you produce the reporting officer.' " *Id.* (quoting McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363, 369

(Footnote 15 Continued)

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[16]Fed.R.Evid. 403 provides as follows:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(1957)). Another way the trial court can safeguard the rights of the party against whose interest the report is being introduced is to comment on the weight of the evidence, *id.*, and to issue an instruction cautioning the jurors against substituting the investigator's judgment for their own, *id.; see also In re Playwood Antitrust Litig.*, 655 F.2d 627, 637 (5th Cir. Unit A Sept.1981), *cert. dismissed,* 462 U.S. 1125, 103 S.Ct. 3100, 77 L.Ed.2d 1358 (1983); *Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 n. 3 (W.D.Mo.1982).

D.

Finally, I note that the weight of authority is against the reasoning of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980). In 1976, the Supreme Court noted that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo.* See Fed.Rule Evid. 803(8)(C)." *Chandler v. Roudebush,* 425 U.S. 840, 863 n. 39, 96 S.Ct. 1949, 1961 n. 39, 48 L.Ed.2d 416 (1976) (citation omitted). The *Smith* court made no reference to the Supreme Court's broad reading of Rule 803(8)(C). *See Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 (W.D.Mo.1982) ("[I]t appears that the Supreme Court has given a broad directive for liberal use of agency findings, somewhat at variance with Judge Wisdom's cautious approach in [*Smith*].").

As Judge Johnson has noted, "*Smith* is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(C)'s 'factual findings' standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir.1984) ('[I]t is well established that the phrase should be interpreted

broadly')." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir.1986) (Johnson, J., concurring specially); *see also Perrin v. Anderson,* 784 F.2d 1040, 1046-47 (10th Cir.1986); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *Litton Systems, Inc. v. AT & T,* 700 F.2d 785, 819 (2d Cir.1983), *cert. denied,* 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir.1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Even in the Fifth Circuit, *Smith* has not been uniformly followed. *See, e.g., Mac Towing Inc. v. American* [1516] *Commercial Lines,* 670 F.2d 543, 547 (5th Cir.1982) (district court properly admitted Coast Guard accident report that attributed blame in shipping case); *Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc.,* 653 F.2d 143, 145 (5th Cir. Unit A Aug. 1981) (findings in NLRB investigative letter admissible under Rule 803(8)(C)); *Garcia v. Gloor,* 618 F.2d 264, 272 (5th Cir.1980) ("The district judge was, indeed, in error in refusing to admit the investigative report and determination of the EEOC."), *cert. denied,* 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). Additionally, courts that have considered the admissibility of JAG reports, similar to the one prepared by LCDR Morgan, under Rule 803(8)(C) have broadly interpreted "factual findings." *See, e.g., Walker v. Fairchild Indus.*, 554 F.Supp. 650, 653 (D.Nev.1982); *Sage v. Rockwell Int'l Corp.*, 477 F.Supp. 1205, 1207-10 (D.N.H.1979); *Schoenborn v. Boeing Co.*, 586 F.Supp. 711, 725, 18 Av. Cas. (CCH) 18,335, 18,344-45 (E.D.Pa.1984).

IV.

A majority of this court agrees that LCDR Morgan's investigative report is a public record and that it is trustworthy for purposes of Rule 803(8)(C). The report is certainly of the sort that the rule contemplates as trustworthy: the report is thorough, as evidenced by the supporting documents totaling 159 pages, and LCDR Morgan's conclusions are credible, having been endorsed by six fellow officers of various ranks. Moreover, the district court gave the plaintiffs ample opportunity to challenge the trustworthiness of the report; nevertheless, the plaintiffs presented no evidence attacking the qualifications of LCDR Morgan or the methodology he employed.

The sole issue that evenly divides this court is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C), encompasses evaluative conclusions derived from the report. Based on the facts uncovered by his extensive investigation, LCDR Morgan reached several conclusions that the district court admitted into evidence. Finding that the "aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash" (Opinion No. 1), LCDR Morgan eliminated, in effect, a defect in the fuel control system as the cause of the accident. He concluded that based on his investigation there was no contributing command or supervisory error (Opinion No. 2). LCDR Morgan also found that neither LCDR Rainey nor ENS Knowlton had any physical or mental ailments that could have caused the crash (Opinion No. 3). Having eliminated several other possible causes of the crash, and based on

(1) the statements of the other instructors and students engaged in the "touch and go" exercise, (2) air traffic control records, and (3) an analysis of the traffic pattern diagram for Middleton Field, LCDR Morgan concluded that "[t]he most probable cause of the accident was the pilots [sic] failure to maintain proper interval." (Opinion No. 7). In other words, in LCDR Morgan's professional judgment, pilot error caused the crash.

In my view, LCDR Morgan's conclusions that were admitted into evidence at trial are "factual findings" within the common sense meaning of that term and as contemplated by the Advisory Committee and the Senate Judiciary Committee. Moreover, consistent with the overall spirit of the Federal Rules of Evidence, LCDR Morgan's evaluative findings could certainly have been helpful to the jury.

For these reasons, the district court did not abuse its discretion when it admitted portions of LCDR Morgan's "opinions." I would nevertheless reverse the district court, concurring in the en banc court's judgment that the district court improperly restricted the cross-examination testimony of John Charles Rainey.

JOHN C. RAINEY,
DEFENDANTS'ADVERSE WITNESS,
DIRECT EXAMINATION
TRIAL TRANSCRIPT

Q. Good morning, Mr. Rainey.

A. Good morning, sir . . .

[Trial Transcrip V5, pg. 60, lines 1-5.]

Q. . . . . In this case, Mrs. Rainey was the instructor pilot, was she not?

A. Yes, sir.

Q. And Mr. Knowlton was the student?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 60, lines 20-24.]

Q. So Mrs. Rainey would have had to have signed out for the aircraft?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 61, lines 16-18]

Q. If she doesn't already know the young man in this case from prior experience or limited experience, it's her obligation to get to know him, emotionally, and get some grasp of his basic knowledge before she takes him up; isn't that so?

A. It's so, within the limits that are available. Ordinarily, you would talk to them prior, possibly look over his training record, if it was available . . . .

[Trial Transcript V5, pg. 62, lines 1-4.]

Q. Now they go out and get up in the airplane and they're on a flight. Isn't her obligation to overlook everything he does and monitor everything he does, or he does it, when he's in control?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 62, lines 14-18.]

Q. Incidentally—Mrs. Rainey coincidentally started her flight training at the same time you did?

A. Yes, sir, we were in the same beginning class . . . .

[Trial Transcript V5, pg. 63, lines 22-24.]

Q. You completed your flight training, both of you, in May of 1974?

A. No, sir. My wife got her wings on the 22nd of February in 1974; I got mine somewhere around the 15th or 16th of May, 1974.

Q. She finished a little ahead of you?

A. Yes, sir . . . .

[Trial Transcript V5, pg. 64, lines 5-11.]

Q. Now, with American Airlines, you were in the initial stages of crew training and you were there for a flight engineer, were you not?

A. Yes, sir.

Q. At all times with American Airlines, you were a flight engineer?

A. That's correct.

Q. And you now have a commitment to go back to American Airlines as a flight engineer?

A. I have an option to go back as a flight engineer, yes, sir . . . .

[Trial Transcript V5, pg. 66, lines 13-23.]

Q. When you got laid off by American Airlines, you requested the Navy to come back on active duty in the Reserves?

A. Yes, sir.

Q. That's how you got back on active duty in 1981?

A. That's correct . . . .

[Trial Transcript V5, pg. 67, line 49.]

Q. Now, Mrs. Rainey came back into the Navy as a Reserve Officer on active duty at what time?

A. The same time I did.

Q. So you both came back upon request for active duty in 1981?

A. Yes, sir.

Q. Both came back as instructor pilots?

A. Yes, sir.

[Trial Transcript V5, pg. 67, lines 15-22.]

Q. And under Training Wing Five, there were three training squadrons; is that right?

A. There are five training squadrons. There were three fixed wings and two helicopter . . . .

[Trial Transcript V5, pg. 68, lines 10, 14.]

Q. And at all times we're talking about here, she was in Squadron Three; is that right?

A. That's correct.

Q. You were assigned to Squadron Two?

A. Correct . . . .

[Trial Transcript V5, pg. 68, lines 21-25.]

Q. Mrs. Rainey, in Squadron Three, has as her skipper Lieutenant Colonel Habermacher of the Marine Corps.?

A. In the latter half of the time she was in the squadron. Initially, she had Commander John Healy and he was relieved in May of 1982.

Q. At the time of the accident, her skipper was Lieutenant Colonel Habermacher of the Marine Corps?

A. That's correct . . . .

[Trial Transcript V5, pg. 69, lines 4-11.]

Q. Lieutenant Colonel Habermacher was one of them in the pattern?

A. I was told that. I was not there.

THE COURT: You are going into matter that he doesn't know directly himself. I don't know why you're going into it this way.

MR. TOOTHMAN: He has stated in his letter—

THE COURT: Yes, but it comes from something he was told.

MR. TOOTHMAN: Well, it's an admission. I'll tie it up.

THE COURT: Go ahead, sir . . . .

[Trial Transcript V5, pp. 69, 70, lines 23-9.]

Q. After the accident, at some period either in late 1982 or early 1983, in your squadron, Lieutenant Kolakowski came under you direct command, did he not?

A. Command? He worked for me. I don't know if I'd call it command . . . .

[Trial Transcript V5, pg. 71, lines 24-3.]

Q. In February or March of 1983, as one of your duties in the supervision of Lieutenant Kolakowski, you filled out his fitness report, did you not?

A. I filled out a rough fitness report that I submitted to the operations officer, who then sent it to the commanding officer. The commanding officer is the one who does fitness reports on all officers . . . .

[Trial Transcript V5, pg. 71, lines 19, 25.]

Q. Insofar as Lieutenant Kolakowski, you were the one designated to submit the fitness report on Lieutenant Kolakowski?

A. I submitted the initial draft, yes, sir . . . .

[Trial Transcript V5, pg. 72, lines 8, 11.]

Q. Incidentally, you gave Lieutenant Kolakowski a good fitness report, didn't you?

A. Yes, sir. He was a good officer . . . .

[Trial Transcript V5, pp. 72, 73 lines 25, 2.]

THE COURT: Well, show it to him and see if that was the one he saw.

(Document handed to witness.)

THE WITNESS: That is the statement that I saw.

MR. TOOTHMAN: Tell the jury the date on the statement.

THE WITNESS: September 24, 1982.

THE COURT: Is this the statement that you saw, sir?

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead.

BY MR. TOOTHMAN:

Q. All right, sir. So that after the Shields' flight, this statement was made; isn't that true, sir?

A. That's correct, yes, sir.

Q. And you were present when this statement was made, weren't you?

A. He wrote that statement in my presence, yes, sir.

Q. And you found it so important that you helped him carry it over and give it to Commander Morgan, didn't you?

A. That is correct.

Q. And this is the statement that talks about closing distances, isn't it?

A. Again, that's the only statement I have seen. Yes, that does talk about the closing distances.

Q. And in between those times, you have talked to—in between the time of the accident and the time of this statement on September 24th, you have talked to Captain Guthrie several times, had you not?

A. That is correct.

Q. All right, sir. Next subject. This had to do with a letter you wrote. It is undated and I would like to establish a date with you.

You wrote a letter to Lieutenant Commander Morgan who was—do you know who Lieutenant Commander Morgan is?

A. Yes, sir.

Q. His squadron is what squadron?

A. VT-3.

Q. That is your squadron?

A. No, sir.

Q. You wrote a letter to him what was undated, wherein you recited what you believed to be certain *facts* about the *accident; isn't that so?* (emphasis suplied)

A. I believe it's more correct to say I cited things that I had been told about the accident. I was not there, so I don't know facts about it.

Q. You adopted them as your statements, didn't you?

A. I wrote that letter, yes, sir.

Q. I want to get the date of that letter. Do you remember the date of that letter?

A. No, sir, I do not.

Q. Do you remember that you attached to your letter a statement from Ensign Arnett?

A. To one of my letters, yes, sir, I did.

Q. All right, sir. I'll show you the letter.

(Handing document to witness.)

Q. This is your letter. You enclosed a statement of Ensign Arnett?

A. Yes, sir . . . .

[Trial Transcript V5, pp. 76, 77, 78.]

Q. All right, sir. So then for the purposes of my questions, can we agree that this letter was written the end of 1982 or early 1983?

A. Yes, sir . . . .

[Trial Transcript V5, pp. 78, 79 lines 24-2.]

Q. Now, by this time, by the time you've written this letter, you have talked to Lieutenant Kolakowski, Lieutenant Colonel Habermacher, Ensign Arnett, and Captain Guthrie several times, Hanzell, who was a friend of yours, and Colley? You discussed this case with all of them, hadn't you?

A. I had not discussed the case with Ensign Arnett . . . .

[Trial Transcript V5, pg. 79, lines 6-12.]

Q. All right, sir. Please refer to the letter.

A. Yes, sir.

Q. Paragraph two, did you not state that Lieutenant Commander Rainey attempted to cancel the flight at approximately 0840?

A. That is what I was told.

Q. That's what you said?

A. That's what I wrote, yes, sir.

Q. Now, at the time of 0840 when she attempted to cancel the flight, her request was denied, was it not?

A. Personally, I do not know that. That's what I was told.

Q. Yes, sir. All these things, you weren't there?

A. That's right.

Q. But you talked to all these people and you put these down as facts, didn't you?

A. No, sir, I did not put them down as facts.

Q. You didn't qualify them in any way, did you?

A. I stated in the last paragraph that I submit the above for consideration, in order to present aspects that may not have been covered. I don't know that I presented them as being factual.

THE COURT: Didn't you submit it because you believed them to be true?

THE WITNESS: I had been told them, sir.

THE COURT: Let me ask you this question. Unless you believed them to be true, would you have submitted them?

THE WITNESS: No, sir, I would not.

THE COURT: Then would it be fair to say that you submitted this because while you had been told these things, you believed them to be true?

THE WITNESS: Yes sir.

THE COURT: Go ahead, Mr. Toothman.

Q. When this request to cancel the flight at 0840 was denied to Mrs. Rainey, she reacted in an uncharacteristically heated and disgusted manner, didn't she?

A. Did I say heated?

Q. That's the way—my thing is a little blurred. It's the top of page two of your letter, first line.

A. I can't read that.

Q. All right, sir. You can read the uncharacteristically something and disgusted manner, can't you?

A. Yes, sir.

Q. Now, isn't it true, sir, that you put forth the reasons she tried to cancel this flight was that Ensign Knowlton had been up since 4:30 that morning, as one of the reasons?

A. Yes, sir.

Q. And that they had had one airplane cancel and that they had to wait for this second airplane, and that Ensign Knowlton had an examination at 12:00 that he had to get back for and they were pushed for time?

A. Yes, sir.

Q. That Ensign Knowlton was tired and emotionally drained?

A. I think he said he could possibly have been, yes, sir.

Q. The first line of paragraph C, page two, that they had been exerted to unnecessary pressure, the two of them?

A. I don't know that I said the two of them.

Q. Well, someone was put under unnecessary pressure?

A. Yes, sir, that's what I said.

Q. Go to page four of your letter, paragraph E, second half of paragraph. Now, in this paragraph, you referred to two airplanes, 955— can we agree that that's Mrs. Rainey's airplane?

A. Yes, sir.

Q. And you referred to airplane number 644. Can we agree that that's Lieutenant Colonel Habermacher's airplane?

A. Yes, sir.

Q. Didn't you say, sir, that after Mrs. Rainey's airplane rolled wings level, that Lieutenant Colonel Habermacher's plan came into view unexpectedly at its closest point of approach, although sufficient separation still existed between the aircraft. However, the unexpected proximity of Colonel Habermacher's plane caused one of the aircrew in Mrs. Rainey's plane to react instinctively and abruptly by initiating a hard right turn away from Colonel Habermacher's airplane?

A. That's what I said, based on the information I had at that time, yes, sir.

Q. And this is late December, 1982, early January, 1983, we agreed.

A. Yes, sir.

Q. Now, later on, you and Mrs.—you and Mrs. Knowlton both wrote a letter adopting that same point of view, didn't you?

A. It's not fair to say that Mrs. Knowlton wrote the letter. I wrote the letter and submitted it to her for her approval.

Q. And she signed it?

A. Yes, sir.

MR. TOOTHMAN: Thank you . . . .

[Trial Transcript V5, pp. 77-83.]

CROSS-EXAMINATION

BY MR. LARRY:

Q. John, the inference that Mr. Toothman tried to draw from you was that you influenced the testimony of Captain Guthrie and Ensign Arnett and Lieutenant Kolakowski. Did you do that with any one of these witnesses?

A. No, sir. I—

MR. TOOTHMAN: I object to any of his motivations for these witnesses.

THE COURT: You went into his knowledge of them and so forth. I assumed you were trying to establish some basis for possible bias. The

objection is overruled. You opened that door a little bit.

BY MR. LARRY:

Q. Did you answer the question, John?

A. No, sir, I did not make any attempt to influence their statements.

Q. Has Captain Guthrie ever given any statement that you know of that was in any wise inconsistent with the taped deposition that was presented here in this courtroom?

A. Not that I know of, no, sir.

Q. Now, sir, in your letter to Commander Morgan, when you stated that there was an assumption about a hard right turn, was there some reason why you and Commander Sheilds flew that maneuver three weeks after the crash.

A. Yes, sir. That was based on the information that we had directly after the accident.

Q. And what was your experience? Was it the same as Commander Shield related to this jury, that the aircraft would not stall with power on; was that your experience?

A. Yes, sir. In all of the evolutions that we tested, regimes that we tried, the airplane would not stall with full power available.

Q. One last point. In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably primary cause of this mishap was rollback?

MR. TOOTHMAN: I would object to this, Your Honor. Probable cause is an opinion.

THE COURT: I beg your pardon?

MR. TOOTHMAN: He's trying to get an opinion out of him now, not a fact.

THE COURT: Objection sustained.

MR. LARRY: Your Honor, he has had the ability

— —

MR. TOOTHMAN: I object to him arguing.

MR. LARRY: May I be heard on this?

THE COURT: Yes, sir. Go ahead.

MR. LARRY: On the basis that this letter constitutes an admission by Commander Rainey, he has been asked to answer every single

question Mr. Toothman had respecting—

THE COURT: I don't recall going into anything except the matter about that turn and so forth, and that's all he went into. He did express that opinion and that came in as an admission against him, I suppose, but that doesn't mean you can qualify him for the questions you are now asking. The objection is sustained.

MR. LARRY: No further questions.

[Trial Transcript V5, pp. 83-86.]

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